77-1785

No. 77-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

KERR-McGEE CHEMICAL CORPORATION, *Petitioner,*

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, *et al., Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner Kerr-McGee Chemical Corporation prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The Memorandum Order of the District Court granting Kerr-McGee's motion for summary judgment dated September 29, 1976, is unreported and is reprinted as Appendix A to this Petition at pages 1a-6a, *infra*. The Order of the District Court affirming its earlier Memorandum Order is unreported and is reprinted as Appendix B to this Petition at pages 7a-8a, *infra*. The

Order without opinion by the Court of Appeals for the D.C. Circuit entered on March 28, 1978, is unreported and is reprinted as Appendix C to this Petition at page 9a-10a, *infra*.

JURISDICTION

The judgment of the Court of Appeals (Appendix C, page 9a-10a, *infra*.) was entered on March 28, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Since passage of the Mineral Leasing Act in 1920, the Secretary of the Interior has consistently applied well-recognized administrative criteria to determine whether leases should be issued. Petitioner's entitlement to phosphate leases was established in 1969 and 1970 pursuant to the application of these administrative criteria. In light of this Court's decision in *Greene* v. *United States*, 376 U.S. 149 (1964), the question presented is:

> May the Secretary of the Interior refuse to issue leases to the petitioner on the ground that revised administrative criteria, first promulgated in 1976 during the pendency of this litigation, should be applied to determine whether petitioner's entitlement to the leases should be reaffirmed?

STATUTE INVOLVED

Section 9 of the Mineral Leasing Act of 1920, 41 Stat. 437, as amended by Section 1(a) of the Act of March 18, 1960, 74 Stat. 7, 30 U.S.C. § 211, provides in pertinent part:

> "(b) Where prospecting or exploratory work is necessary to determine the existence or workability

> of phosphate deposits in any unclaimed, undeveloped area, the Secretary of the Interior is authorized to issue, to any applicant qualified under this chapter, a prospecting permit which shall give the exclusive right to prospect for phosphate deposits, including associated minerals, for a period of two years, for not more than two thousand five hundred and sixty acres; and if prior to the expiration of the permit, the permittee shows to the Secretary that valuable deposits of phosphate have been discovered within the area covered by his permit, the permittee shall be entitled to a lease for any or all of the land embraced in the prospecting permit."

Section 9 is reprinted in its entirety as Appendix D to this Petition, page 11a, *infra*. Also reprinted are relevant portions of Section 3 of the Mineral Leasing Act for Acquired Lands, 61 Stat. 913, 30 U.S.C. § 352, page 12a, *infra*.

STATEMENT

1. Factual Background

Petitioner Kerr-McGee Chemical Corporation prospected federal lands located in the Osceola National Forest from 1965 through 1969, pursuant to permits issued by the Department of the Interior, to determine whether valuable deposits of phosphate existed on the lands. These permits were issued by authority granted to the Secretary by Section 9 of the Mineral Leasing Act, as amended in 1960, 30 U.S.C. § 211(b).

The phosphate leasing statute was amended in 1960 to provide an alternative to competitive bidding for phosphate leases. The amended statute authorized the Secretary to create a prospecting permit program to permit exploration of lands not known to contain phosphate identical to other programs that have been author-

ized under the Mineral Leasing Act for coal, sodium and other minerals which had been in effect since 1920. *See* 30 U.S.C. §§ 201(b), 223 (now repealed), 261-62, 271-72, 281-82; *see also* 1960 *U.S. Code Cong. & Admin. News,* 1805-1809.[1] Under such programs, a prospecting permittee explores lands with no known mineral deposits, at its own expense, to determine whether valuable minerals exist on the lands. In the specific case of phosphates, the amended Section 9 provides that, if before the expiration of its permit a permittee "shows to the Secretary that valuable deposits of phosphate have been discovered within the area covered by his permit," then "the permittee *shall be entitled* to a lease for any or all of the land embraced in the prospecting permit." 30 U.S.C. § 211(b). (Emphasis supplied.)

In 1969 and 1970, having made discoveries of phosphate on lands covered by its permits, Kerr-McGee applied to the Department for phosphate leases. At this time, Kerr-McGee submitted to the United States Geological Survey all data required by departmental regulations to establish that it met the statutory criteria and was entitled to leases. The USGS considered the application and, on March 28, 1969, and December 1, 1970, certified to the Secretary that Kerr-McGee's discoveries were "valuable" within the meaning of Section 9 and hence that five phosphate leases should be issued to the Company.

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[1] Because the lands in question here were "acquired lands" within the meaning of the Mineral Leasing Act for Acquired Lands, the consent of the agency administering the lands was also required before prospecting permits could be issued. 30 U.S.C. § 352. The Department of Agriculture, whose Forest Service administers the Osceola National Forest, formally gave its consent prior to the issuance of prospecting permits to Kerr-McGee.

This action by the USGS was part of its normal responsibilities within the Department. The Geological Survey has long had the responsibility, delegated to it by the Secretary, for making all factual determinations with respect to the value of mineral discoveries made by prospecting permittees. Since passage of the Mineral Leasing Act in 1920, no other department or division within the Department has, at any time, made these determinations. Leases have been issued automatically once the USGS certifies that an applicant satisfies the statutory criteria.

In reviewing Kerr-McGee's lease applications in 1969 and 1970, the USGS applied administrative criteria to determine the value of Kerr-McGee's discoveries that had been used since the Mineral Leasing Act was passed in 1920. But despite this final Departmental action by the USGS, no leases were issued to Kerr-McGee.

2. Procedural Background To Litigation

Eight years have elapsed since the USGS determined that leases should be issued to Kerr-McGee. Since that time, no affirmative action has been taken on Kerr-McGee's lease applications. The lengthy delay is attributable in part to a decision by the Department to prepare an environmental impact statement on phosphate leasing in the Osceola National Forest pursuant to the National Environmental Policy Act, 42 U.S.C. § 4332 *et seq.* The final impact statement was released in June, 1974, after three years of preparation and has not been challenged as inadequate at any time since its publication.

After preparation of the final impact statement, more than eighteen months passed without any action

by the Department on Kerr-McGee's lease applications. On April 13, 1976, faced with the Department's refusal to take prompt action on its lease applications, Kerr-McGee brought this action, seeking to compel the issuance of the leases to which it was statutorily entitled. Following commencement of Kerr-McGee's action, the Department announced the adoption of new regulations governing the issuance of leases to prospecting permittees, substantially changing the administrative criteria which had to that time been used by the Geological Survey to determine whether leases should be issued. *See* 41 Fed. Reg. 18845 (May 7, 1976). The defense offered by the government in explaining its failure to take action with respect to Kerr-McGee's applications was that it desired to complete new studies on the Osceola National Forest and then apply the new regulations to determine whether Kerr-McGee had made valuable discoveries and accordingly was entitled to leases.

3. Decisions Below

On May 14, 1976, Kerr-McGee moved for summary judgment on the ground that the USGS had certified that its discoveries of phosphate were "valuable" in accordance with the statutory requirements of Section 9, and that its rights to phosphate leases had, accordingly, vested. On September 29, 1976, the District Court issued its memorandum order, directing that the Secretary comply with his statutory duty to issue phosphate leases to Kerr-McGee. (Appendix A, page 6a, *infra.*) The court found that Kerr-McGee had acquired vested rights to its five leases on March 28, 1969, and December 11, 1970, when the United States Geological Survey

> "as designee of the Secretary of the Interior, certified . . . that plaintiff had made valid discoveries of valuable mineral deposits . . . within the meaning of the statute." (Mem. Order, p. 2)

The trial court found that the USGS had applied "standards and criteria prevailing and recognized at that time," and that

> "[t]he government does not now contend that the law had been incorrectly interpreted; that standards and criteria were erroneously applied; or that the plaintiff failed to comply with them in any manner." (Mem. Order, pp. 4-5.) (page 5a.)

The court held that in light of the Department of the Interior's "long established" interpretation of Section 9 "the holder of a prospecting permit who makes a valuable discovery of phosphate has an unqualified statutory entitlement to a preference right lease." Thus Kerr-McGee had an "acquired and vested interest" in the five leases. The court ordered that the Secretary was "mandated to issue said leases immediately." (Mem. Order, p. 6) (page 6a.) The court concluded:

> "The Secretary of the Interior has had nearly seven years to consider Kerr-McGee's lease application. To accede to the government's representation that a final decision may not be forthcoming for an additional 12 to 15 months, is unreasonable and unwarranted. The inordinate delay, accompanied by what appears to be a cavalier disregard of the plaintiff's rights, cannot be condoned." (Mem. Order, p. 4.) (page 4a.)

Thereafter, the government moved the District Court to reconsider its decision, claiming that a comprehensive review of past Departmental practices would not

support the court's critical finding that the USGS had applied longstanding administrative criteria in certifying that Kerr-McGee's discoveries were "valuable." The court stayed its judgment and twice gave the government the opportunity to present additional historical evidence and present argument concerning the results of a search of the Department's files pertaining to mineral leases issued under the Mineral Leasing Act during the past 10 years, not only for phosphate but also for coal, sodium, potassium and sulphur. In its final factual submission to the trial court, the Department stated:

> "This evidence may reasonably be construed as supporting the conclusion that the 1969 and 1970 certifications of discoveries by plaintiffs of valuable deposits of phosphate were made in accordance with the then-prevailing *practice* of the Geological Survey." (emphasis in original.) (J.A. 374.)[2]

On March 4, 1977, the District Court issued an order reinstating its earlier judgment, granting Kerr-McGee's motion for summary judgment. (Appendix B, page 8a, *infra*.) The court stated:

> "The Court has considered the supplemental memoranda of the parties, the supporting affidavits and exhibits and concludes that in the 1969 and 1970 certifications the USGS relied upon longstanding criteria; that the certifications reflected a consistent application of administrative practices; and that the Secretary, several solicitors and other responsible officials of the Department of the Interior have likewise voiced their support and recognition of the standard and practices." (Order of March 4, 1977, p. 2.) (page 8a.)

[2] "J.A." refers to the Joint Appendix filed with the Court of Appeals.

The court ordered that "the defendant . . . take the necessary steps to comply with" the court's earlier September 29, 1976 order. (*Id.* at 2.) (page 8a.)

On appeal, following submission of briefs by the original parties and a number of *amici curiae,* the Court of Appeals summarily reversed the decision of the District Court and ordered the case dismissed, stating:

> "The ongoing administrative proceedings before the Secretary of the Interior were aborted by the issuance of the writ of mandamus by the District Court. Appellee should have exhausted its administrative remedies before seeking the writ or petitioning for judicial review." (Appendix C, page 10a.)

REASONS FOR GRANTING THE WRIT

The District Court ordered that the Secretary of the Interior comply with his unambiguous statutory duty to issue phosphate leases to Kerr-McGee to which the Company was entitled under Section 9 of the Mineral Leasing Act. That section of the Act creates an automatic entitlement to leases if a prospecting permittee finds valuable deposits of phosphate on the lands covered by a validly issued prospecting permit. Here, the United States Geological Survey, acting in its formal capacity as designee of the Secretary, certified that Kerr-McGee met these statutory criteria and that leases should be issued. The USGS' certifications occurred in 1969 and 1970. Yet no action has been taken to honor Kerr-McGee's vested rights.

The Court of Appeals effectively held that the Department is empowered to apply, retroactively, regulations promulgated in May 1976, redefining the admin-

istrative criteria that should be applied to determine whether a lease applicant is entitled to a lease. The court's decision requiring Kerr-McGee to submit to supplemental administrative procedures long after its rights had vested pursuant to the authoritative administrative determinations that leases should be issued is in square and irreconciliable conflict with this Court's decision in *Greene* v. *United States,* 376 U.S. 149 (1964), as well as in conflict with decisions of the other courts of appeals that have followed *Greene. Koger* v. *Ball,* 497 F.2d 702 (4th Cir. 1974); *Coe* v. *Secretary of HEW,* 502 F.2d 1337 (4th Cir. 1974); *South East Chicago Comm'n* v. *Department of HUD,* 488 F.2d 1119 (7th Cir. 1973). The Court of Appeals either misunderstood, or ignored, the clear mandate of the Mineral Leasing Act and the requirements of the decisions of this Court.

The issue whether Kerr-McGee's vested right to phosphate leases may be destroyed by the Interior Department's retroactive application of revised administrative criteria is of critical importance to private mining companies engaged in costly mineral exploration in the expectation that their statutory entitlement to mineral leases will be honored by the Department if valuable minerals are discovered. Other provisions of the Mineral Leasing Act provide similarly as to other minerals and all are affected by the court of appeals decision. The Department's "cavalier disregard" of Kerr-McGee's rights presents a serious and unprecedented abrogation of the congressional scheme for mineral leasing.

In Section I, we show that because the Mineral Leasing Act requires the issuance of mineral leases to a prospecting permittee who makes a "valuable" dis-

covery of a mineral, Kerr-McGee's rights to leases vested under the Act when, in 1969 and 1970, the USGS applied established administrative criteria and determined that Kerr-McGee's discoveries of phosphates were "valuable" within the meaning of the Mineral Leasing Act. In Section II, we show that Kerr-McGee's rights to leases established under the administrative criteria used to determine the value of mineral discoveries since 1920 may not be destroyed by retroactive application of revised administrative regulations promulgated in 1976 redefining the criteria to be applied by the USGS in making discovery determinations.

I

Under relevant provisions of the Mineral Leasing Act, the Secretary of the Interior has no discretion to refuse to issue mineral leases to a prospecting permittee that has made "valuable" discoveries of a mineral covered by any such provision. With specific respect to phosphate, Section 9 of the Mineral Leasing Act provides that such a prospecting permittee "shall be entitled" to a lease in these circumstances. Other provisions are comparable. *See* 30 U.S.C. §§ 201 (b), 261-62, 271-72, 281-82. There is no room in this statutory scheme for any exercise of discretion by the Secretary after the value of a discovery has been certified. *See Wilbur* v. *United States ex rel. Barton,* 46 F.2d 217, 221 (D.C. Cir. 1930), *aff'd on other grounds sub nom. United States ex rel. McLennan* v. *Wilbur,* 283 U.S. 414 (1931).

Since the Mineral Leasing Act was first passed in 1920, the Department has consistently construed provisions of the Act identical to Section 9 as im-

posing a mandatory duty to issue coal,[3] sodium[4] and oil and gas leases.[5] This Departmental construction of the Mineral Leasing Act was formally reviewed in 1975, and in two separate legal memoranda the Department's Solicitors concluded:

> "[T]he holder of a prospecting permit has an *absolute right* to a lease if that holder shows to the Secretary that he has made the requisite discovery." (J.A. 107.) (emphasis supplied.) (*See also* J.A. 82.)

In enforcing the Mineral Leasing Act, the Secretary has delegated sole responsibility to the Geological Survey to make the final factual determination whether the discoveries made by a lease applicant are sufficiently "valuable" so as to require the issuance of a lease. In accordance with this procedure, on March 28, 1969, and December 11, 1970, the Geological Survey certified that Kerr-McGee had made "valuable" discoveries of phosphate and that it was therefore entitled to five phosphate leases. No other agency action remained to be taken after the 1969 and 1970 certifications by the USGS for leases thereupon automatically to be issued.

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[3] *See Peter I. Wold*, [II], 13 I.B.L.A. 63, 66, 80 I.D. 623, 625 (1973); *Emil Usibelli*, 60 I.D. 515, 523 (1951); *Emil Usibelli*, unpublished decision A-26277, decided October 2, 1951; *Directive to the General Land Office by the Secretary of the Interior*, 54 I.D. 350, 351 (1934).

[4] *See Roy Forehand*, 59 I.D. 397, 399 (1974); *Regulations of the Department of the Interior*, Circular No. 1194, 52 I.D. 651, 652 (1929).

[5] *See Interpretation of the Mineral Leasing Act of February 25, 1920, as amended, Opinion of the Department*, June 4, 1937, 56 I.D. 174, 190 (1937); *Montana Eastern Pipeline Co.*, 55 I.D. 189, 191 (1935).

The administrative criteria used in 1969 and 1970 by the USGS to determine the value of Kerr-McGee's discoveries are set forth in the Department's *Geological Survey Conservation Division Manual,* which provides that the criteria are to be used by the USGS in making "[d]iscovery [d]eterminations." *See* Manual § 671.6.1. (J.A. 250.)[6]

The use of these criteria has been repeatedly upheld by the Department. In 1929, the Department issued regulations providing that the criteria should be used in issuing sodium leases under the Mineral Leasing Act,[7] and the same regulations were applied to the issuance of coal, sulphur and potash leases.[8] The Interior Board of Land Appeals upheld the validity of the criteria in *James C. Goodwin,* 9 I.B.L.A. 139, 155, 80 I.D. 7 (1973) and *Emil Usibelli* A-26277 (unpublished

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[6] The criteria are quite extensive. As defined in Section 671.5.2 (B)(1) of the *Conservation Division Manual,* they include:

> "(a) [The mineral's] character and . . . quality,' whence comes its value, and
>
> (b) [The mineral's] accessibility, quantity, thickness, depth and other conditions that affect the cost of its extraction."

While these criteria are redefined in the section quoted above with specific reference to the coal leasing provisions of the Act, the *Manual* makes it plain that the same criteria are to be applied to all minerals subject to the prospecting permit/leasing provisions of the Act, including phosphate, in determining whether leases should be issued. *See* Sections 671.5.2(B)(5) and 671.6.1. The Department has consistently applied identical criteria to all of the minerals subject to leasing under the Mineral Leasing Act.

[7] *See* Regulations of the Department of the Interior, Circular No. 1194, 52 I.D. 651, 652 (1929).

[8] *See* legal memoranda of Solicitors of the Department of the Interior, dated June 30 and December 4, 1975. (J.A. 79, 107.)

decision, dated October 2, 1951). On several occasions, the Department has submitted statements to Congress affirming use of the criteria.[9]

The District Court directed a comprehensive review of Department files, to determine the criteria that had in fact been used by the USGS during the past ten years in issuing coal, sodium, sulphur, potash and phosphate leases under the Mineral Leasing Act.

The District Court found:

> "[I]n the 1969 and 1970 certifications the USGS relied upon longstanding criteria; that the certifications reflected a consistent application of administrative practices; and that the Secretary, several solicitors and other responsible officials of the Department of the Interior have likewise voiced their support and recognition of the standard and practices." (Order of March 4, 1977, p. 2.) (page 8a.)

In sum, in 1969 and 1970 the Department followed established procedures and applied regulations in effect for more than fifty years to determine that Kerr-McGee had a statutory entitlement to five phosphate leases. Under the Department's longstanding construction of the Mineral Leasing Act, Kerr-McGee acquired vested rights to these phosphate leases.

The Interior Department, however, persists in refusing to issue Kerr-McGee's leases on the ground that

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[9] *See* letter of Interior Solicitor Mellich to Hon. Henry Jackson, Chairman, Senate Committee on Interior and Insular Affairs, dated July 6, 1971 (quoted at J.A. 97); Issue Paper of the Department of the Interior, in connection with the Federal Coal Leasing Amendments Act of 1975, P.L. 94-377, 90 Stat. 1083 (1976) (submitted as Exhibit 1 to Appellee's Supplemental Memorandum to the Court of Appeals, October 13, 1977).

it now wishes to apply criteria different from those traditionally applied by the USGS in determining whether Kerr-McGee's discoveries are "valuable". These new criteria were promulgated on May 7, 1976, three weeks *after* commencement of this action and some six years after Kerr-McGee's rights had vested. *See* 41 *Fed. Reg.* 18845 (May 7, 1976).

The Court of Appeals apparently accepted this argument. Without any explanation, the court reversed the District Court's decision on the ground that Kerr-McGee should have "exhausted its administrative remedies" (*i.e.*, comply with the 1976 regulations) before seeking judicial review. The Court of Appeals thus upheld the power of the government to apply a new standard that would destroy the right of Kerr-McGee to phosphate leases that vested when it was found to have made valuable discoveries.

II

The decision by the Court of Appeals is in direct conflict with this Court's decision in *Greene* v. *United States,* 376 U.S. 149 (1964), which holds that an agency has no power to apply its regulations retroactively if such application impairs or destroys vested rights. In *Greene,* the Court considered whether a government employee, unlawfully discharged in 1953 due to revocation of his security clearance, could assert an administrative claim for restitution. The case turned on whether the plaintiff's claim for damages was controlled by a 1955 Department of Defense regulation (which permitted such contractual restitution claims) or a 1960 regulation issued while the plaintiff's claim was being processed by the Department (which would have prevented assertion of the claim.)

The Court held that Greene's rights "matured and were asserted under the 1955 directive," and that Greene had obtained "the requisite final, favorable determination" under the 1955 regulations. 376 U.S. at 160. The Court in *Greene* relied in part on the general principle that "a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' " (*Id.*) But the Court did not look to the intent of the agency in promulgating the 1960 regulation. Rather, it assessed the unfair impact such retroactive application of administrative regulations might have on individual rights and held that the retroactive application of administrative regulations to destroy rights established under prior regulations was unlawful. The Court stated:

> "In view of the substantial differences between the two regulations and in view of the additional factual determinations that would be relevant under the 1960 regulation but irrelevant under the 1955 regulation, we conclude the 1960 regulation does not provide a reasonable basis for reviewing petitioner's rights under the 1955 regulation . . . . Since in this case the only available administrative procedure entailed the burden of presenting the claim under an inapplicable and substantially revised regulation, that procedure must be regarded as inappropriate and inadequate and therefore need not be pursued." 376 U.S. at 163.

The Court reaffirmed its holding in *Greene* in *Bradley* v. *Richmond School Board,* 416 U.S. 696, 720 (1974). *Greene* has been followed in such cases as *Koger* v. *Ball,* 479 F.2d 702, 706 (4th Cir. 1974); *Coe* v. *Secretary of HEW,* 502 F.2d 1337, 1340 (4th Cir. 1974); *South East Chicago Comm'n* v. *Department of HUD,* 488 F.2d 1119, 1127 (7th Cir. 1973), and *Saint Francis Memorial Hospital* v. *Weinberger,* 413 F. Supp. 323, 332 (N.D. Cal. 1976). As the Court of Appeals held in the *Coe* case, "retrospective application" of administrative regulations is prohibited where it interferes with an "antecedent right" under earlier regulations. *See* 502 F.2d at 1340.

As in *Greene,* Kerr-McGee's rights "matured and were asserted" under the regulations of the Department in effect in 1969 and 1970 when it first applied for phosphate leases. And as in *Greene,* Kerr-McGee obtained "the requisite final, favorable determination" by the agency when the USGS certified the value of its discoveries under the old regulations.

The Department now seeks to apply regulations that very substantially alter the criteria to be used by the USGS in determining the value of mineral discoveries. The Court of Appeals upheld the Department's right to require Kerr-McGee to submit to these new additional procedures. The decision that Kerr-McGee failed to submit to those additional procedures and thus to exhaust its administrative remedies plainly collides with *Greene* and the court of appeals decisions that followed it. No less than in *Greene,* the additional administrative procedures required by the Court of Appeals are "inappropriate and inadequate and therefore need not be pursued." Kerr-McGee's statutory rights as established under the prior Departmental regulations must be honored.

CONCLUSION

The writ of certiorari should be issued.

Respectfully submitted,

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June 16, 1978

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-0608

KERR-MCGEE CHEMICAL CORPORATION, *Plaintiff*,

v.

THOMAS S. KLEPPE, et al., *Defendants*.

Memorandum Order

Kerr-McGee Chemical Corporation (Kerr-McGee) seeks an order compelling the defendants, Secretary of the Interior and the Department of the Interior, to issue it a preference right lease, 30 U.S.C. § 211(b),[1] for the purpose of mining phosphate in the Osceola National Forest (Osceola) in Florida. Jurisdiction is based on 5 U.S.C. §§ 701-06; 28 U.S.C. § 1331(a); 28 U.S.C. § 1361; and 28 U.S.C. §§ 2201-02. The matter in controversy, exclusive of interest and costs, exceeds $10,000.

The matter is before the Court on plaintiff's motion for summary judgment and the Department of Interior's motion to dismiss this cause as to them. The Court has reviewed all memoranda, affidavits and exhibits filed and after oral hearing concludes that both motions should be granted.[2]

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[1] 30 U.S.C. § 211(b) provides in pertinent part that
> if prior to the expiration of the permit the permittee shows to the Secretary that valuable deposits of phosphate have been discovered within the area covered by his permit, the permittee shall be entitled to a lease. . . .

[2] The State of Florida was granted leave to intervene in this proceeding and filed opposition to plaintiff's motion for summary judgment.

Factual Background

The critical facts are free of dispute.[3] In 1964, Kerr-McGee applied for five prospecting permits to explore for mineral deposits in Osceola. Those permits were issued by the Secretary of the Interior pursuant to the authority of § 211(b). Later, in January 1969 and August 1970, Kerr-McGee filed applications for preference right leases based on commercial discoveries of phosphate on portions of the same land on which it had been granted a permit. The United States Geological Survey, as designee of the Secretary of the Interior, certified on March 28, 1969, and December 11, 1970, that plaintiff had made valid discoveries of valuable mineral deposits on these lands within the meaning of the statute.[4]

On July 27, 1971, the State of Florida filed a complaint in this Court (*State of Florida* v. *Morton, et al.*, C.A. No. 1496-71)[5] against the Secretary of the Interior and other federal government officials seeking to enjoin those defendants from approving phosphate mining leases in Osceola and from further processing requests for such leases. The plaintiff Kerr-McGee is an intervening defendant in that proceeding. On October 17, 1972, a motion for preliminary injunction was denied the State of Florida in that litigation upon a finding, *inter alia*, that the federal defendants had "committed themselves to taking no final administrative action on pending or future permits or leases prior to completion of the final Osceolo NEPA statement."

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[3] The factual allegations detailed here are found in the memoranda, exhibits or affidavits submitted by the parties.

[4] *See* Affidavit of Russell G. Wayland, Chief, Conservation Division, United States Geological Survey, June 7, 1976.

[5] The State of Florida sought equitable relief on the grounds that the Secretary of the Interior failed to comply with the provisions of the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. (1973).

Lengthy delays were associated with the final preparation of the environmental impact statement. In August of 1972 the statement was promised by mid-June of 1973. However, the final statement covering phosphate leasing in the Osceola National Forest was not prepared and issued by the Department of the Interior until June 27, 1974.

After the statement was issued, the Justice Department, on behalf of the Secretary of the Interior, repeatedly represented to this Court that a decision respecting the issuance of preference right leases for lands in Osceola would be made shortly. The Court was also advised that a draft program option document respecting the Osceola leases was distributed to offices both inside and outside the Department of the Interior between October 15 and November 1, 1974, and that a final decision option document would be submitted to the Secretary of the Interior in early December 1974.

Between May 15 and mid-October 1975, the Department of the Interior survived three Secretaries of the Interior. Rogers C. B. Morton, who had served since early 1971, resigned when he was sworn in as Secretary of Commerce on May 1, 1975. He was followed by Stanley Hathaway, who served from June 13 to July 25, 1975. The present Secretary, Thomas S. Kleppe, was sworn in as Secretary on October 17, 1975. This turn over in the cabinet position created uncertainty, confusion and further delay in the decision with respect to the leases sought by the plaintiff.

By letter dated September 22, 1975, the Associate Solicitor for the Department of the Interior, informed Kerr-McGee that it was necessary for Thomas S. Kleppe, then Secretary-Designate, to be fully apprised of the Osceola phosphate leasing matter, and, depending upon the length of the confirmation process, it was possible that a decision would be made in the near future. On October 17, 1975, the Justice Department, on behalf of the Secretary, announced

to the Court (in *State of Florida* v. *Morton*), that it was no longer possible to predict when a decision respecting the plaintiff's applications would be made.

Later, on October 28, 1975, the Secretary issued a "news release" stating: that additional information was necessary before a Department decision could properly be made on preference right lease applications within Osceola; and, that the Secretary was therefore directing an "intensive two-year study" to analyze the effects of phosphate mining upon northern Florida's underground water supply and wildlife. The release further stated that action on lease applications would be stayed until the two-year study was completed and that the Department had taken preliminary steps to secure the necessary information and tentatively expected to complete the studies by December 1977.

On May 7, 1976, the Department of the Interior also promulgated a new set of regulations [6] prescribing the information to be submitted by a permittee to demonstrate the existence of coal in commercial quantities or the existence of a valuable deposit of one of the other minerals (including phosphate) for which prospecting permits are issued. 30 U.S.C. §§ 201(b), 211(b), 262, 272 and 282.

CONCLUSIONS

The Secretary of the Interior has had nearly seven years to consider Kerr-McGee's lease application. To accede to the government's representation that a final decision may not be forthcoming for an additional 12 to 15 months, is unreasonable and unwarranted. The inordinate delay, accompanied by what appears to be a cavalier disregard of the plaintiff's rights, cannot be condoned.

The Department of the Interior has long established policy with respect to interpretation of § 211(b), and it has consistently recognized that the holder of a prospecting

[6] 41 Fed. Reg. 18845.

permit who makes a valuable discovery of phosphates has an unqualified statutory entitlement to a preference right lease.[7] Indeed, this obligation of the Secretary of the Interior has been conceded by the government.[8] Under the circumstances, the plaintiff is entitled to rely upon the Department's interpretations and policies.

The prior March 28, 1969, and December 11, 1970, certifications of the Geological Survey that plaintiff had discovered valuable deposits were based on standards and criteria prevailing and recognized at that time. The government does not now contend that the law had been incorrectly interpreted; that standards and criteria were erroneously applied; or that the plaintiff failed to comply with them in any manner. *Automobile Club of Michigan* v. *Commissioner of Internal Revenue,* 353 U.S. 180, 183 (1957); *Pennsylvania Water and Power Co.* v. *Federal Power Comm'n,* 123 F.2d 155, 162 (1941), *cert. denied,* 315 U.S. 806 (1942).

Plaintiff has an acquired and vested interest. Fairness and equity dictate that the recently implemented regulations of May 1976 cannot void that interest. *Coe* v. *Secretary of Health, Education and Welfare,* 502 F.2d 1337, 1340 (4th Cir. 1974); *Koger* v. *Ball,* 497 F.2d 702, 706 (4th Cir. 1974). To do so, would result in a gross injustice.

Kerr-McGee's statutory entitlement cannot be abridged by the National Environmental Policy Act. The requirements of that Act cannot supplant the statutory requirement of § 211(b). *United States* v. *SCRAP,* 412 U.S. 669, 694 (1973). The issuance of a lease will permit plaintiff to commence preparation of a mining plan but their proposals

[7] Office of the Solicitor, Department of the Interior, Legal Memoranda of Solicitor, "Preference Right Leasing," June 30, 1975, and December 4, 1975. Pl. Ex. 3 and 4.

[8] Answer of Federal Defendants, C.A. No. 1496-71.

must be approved by the Secretary of the Interior before mining operations actually begin.

Mandamus is warranted to direct the Secretary of the Interior to perform a ministerial act.

The Department of the Interior is improperly named as a party defendant. *Blackmar* v. *Guerre,* 342 U.S. 512 (1952).

Accordingly, it is this *29th* day of September, 1976,

ORDERED that plaintiff's motion for summary judgment be and it hereby is granted;

DECLARED that the phosphate leasing statute, 30 U.S.C. § 211(b), requires the issuance of a preference right mining lease when a permittee makes a discovery of a valuable mineral deposit on land embraced in a valid permit;

DECLARED that since Kerr-McGee has made valuable discoveries under valid permits BLM-A-079903, BLM-A-079904, BLM-A-079905, BLM-A-079906 and BLM-A-079907, preference right leases must issue;

ORDERED that the Secretary is enjoined from refusing to issue said leases to which plaintiff is entitled, and is mandated to issue said leases immediately;

ORDERED that this action is dismissed as to the defendant Department of the Interior.

/s/ BARRINGTON D. PARKER
Barrington D. Parker
United States District Judge

Filed September 29, 1976.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-0608

KERR-MCGEE CHEMICAL CORPORATION, *Plaintiff,*

v.

CECIL D. ANDRUS, *Defendant.*

Order

On September 29, 1976, this Court entered a Memorandum Order granting Kerr-McGee's motion for summary judgment, declaring plaintiff's entitlement to certain preference right phosphate leases and enjoining the Secretary of the Interior * from refusing to issue the leases.

In holding for the plaintiff, the Court found that the Department of the Interior had an established policy which recognized that holders of phosphate prospecting permits who made valuable discoveries of phosphates had a statutory entitlement to preference right leases, and that the 1969 and 1970 certifications of the United States Geological Survey (USGS) that Kerr-McGee had discovered valuable deposits were based on prevailing and long utilized standards and criteria.

Following the September 29th ruling, the Government moved to alter or amend that Memorandum Order claiming that there was doubtful support for the findings that the USGS adhered to established administrative practices in certifying plaintiff's phosphate discoveries. Accordingly, on November 15, 1976, the Court stayed the earlier ruling and

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* At the time the complaint was filed, Thomas S. Kleppe was the Secretary of the Interior. The Court, sua sponte, has substituted the present incumbent in that position as party defendant.

directed the parties to submit additional supporting data addressed to what practices had been followed with respect to the grant of preference right leases for phosphate, coal, sodium and other minerals. Specifically, the Court was concerned with and directed the parties to submit memoranda on the issue as to whether the defendant had in the past granted preference right leases based on the standard, the commercial quantity and quality test. That standard had been used by the USGS as a basis for finding that plaintiff had made appropriate discoveries entitling it to issuance of phosphate preference right leases.

The Court has considered the supplemental memoranda of the parties, the supporting affidavits and exhibits and concludes that in the 1969 and 1970 certifications the USGS relied upon longstanding criteria; that the certifications reflected a consistent application of administrative practices; and that the Secretary, several solicitors and other responsible officials of the Department of the Interior have likewise voiced their support and recognition of the standard and practices.

Accordingly, it is this 3rd day of March, 1977

ORDERED that the Order of November 15, 1976, is vacated and set aside, and it is further

ORDERED that the Memorandum Order of September 29, 1976, is affirmed, and the defendant is directed to take the necessary steps to comply with that Order.

/s/ BARRINGTON D. PARKER
Barrington D. Parker
United States District Judge

Filed March 4, 1977.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[No Opinion]

September Term, 1977

Civil Action No. 76-0608

No. 77-1478

KERR-MCGEE CHEMICAL CORP.

v.

CECIL D. ANDRUS, Secretary of the Interior, *et al.*
STATE OF FLORIDA, Appellant

No. 77-1483

KERR-MCGEE CHEMICAL CORP.

v.

CECIL D. ANDRUS, Secretary of the Interior, Appellant
DEPARTMENT OF THE INTERIOR *et al.*

Appeals from the United States District Court for the District of Columbia.

Before: SWYGERT,* WRIGHT, and ROBB, Circuit Judges.

Judgment

(FILED MARCH 28, 1978)

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. While the issues

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* Of the Seventh Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a) (1970).

presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

The ongoing administrative proceedings before the Secretary of the Interior were aborted by the issuance of the writ of mandamus by the District Court. Appellee should have exhausted its administrative remedies before seeking the writ or petitioning for judicial review.

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the orders of the District Court of September 29, 1976 and March 4, 1977 are hereby reversed. It is

FURTHER ORDERED and ADJUDGED by this court that this matter is remanded to the District Court with instructions to dismiss the proceedings there pending.

Per Curiam
For the Court

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

APPENDIX D

A. Pertinent provisions of the Mineral Leasing Act of 1920, 41 Stat. 437, as amended by Section 1(a) of the Act of March 18, 1960, 74 Stat. 7, 30 U.S.C. § 211, read as follows:

3. PHOSPHATES

§ 211. PHOSPHATE DEPOSITS—AUTHORIZATION TO LEASE LAND; TERMS AND CONDITIONS; ACREAGE

(a) The Secretary of the Interior is authorized to lease to any applicant qualified under this chapter, through advertisement, competitive bidding, or such other methods as he may by general regulations adopt, any phosphate deposits of the United States, and lands containing such deposits, including associated and related minerals, when in his judgment the public interest will be best served thereby. The lands shall be leased under such terms and conditions as are herein specified, in units reasonably compact in form of not to exceed two thousand five hundred and sixty acres.

PROSPECTING PERMITS; ISSUANCE; TERM; ACREAGE; ENTITLEMENT TO LEASE

(b) Where prospecting or exploratory work is necessary to determine the existence or workability of phosphate deposits in any unclaimed, undeveloped area, the Secretary of the Interior is authorized to issue, to any applicant qualified under this chapter, a prospecting permit which shall give the exclusive right to prospect for phosphate deposits, including associated minerals, for a period of two years, for not more than two thousand five hundred and sixty acres; and if prior to the expiration of the permit the permittee shows to the Secretary that valuable deposits of phosphate have been discovered within the area covered by his permit, the permittee shall be entitled to a lease for any or all of the land embraced in the prospecting permit.

EXTENSION OF TERM OF PERMIT

(c) Any phosphate permit issued under this section may be extended by the Secretary for such an additional period, not in excess of four years, as he deems advisable, if he finds that the permittee has been unable, with reasonable diligence, to determine the existence or workability of phosphate deposits in the area covered by the permit and desires to prosecute further prospecting or exploration, or for other reasons warranting such an extension in the opinion of the Secretary.

• • •

B. Pertinent provisions of the Mineral Leasing Act for Acquired Lands, 61 Stat. 913, 30 U.S.C. § 352, read as follows:

§ 352. DEPOSITS SUBJECT TO LEASE; CONSENT OF DEPARTMENT HEADS; LANDS EXCLUDED

Except where lands have been acquired by the United States for the development of the mineral deposits, by foreclosure or otherwise for resale, or reported as surplus pursuant to the provisions of the Surplus Property Act of 1944, all deposits of coal, phosphate, oil, oil shale, gas, sodium, potassium, and sulfur which are owned or may hereafter be acquired by the United States and which are within the lands acquired by the United States (exclusive of such deposits in such acquired lands as are (a) situated within incorporated cities, towns and villages, national parks or monuments, (b) set apart for military or naval purposes, or (c) tidelands or submerged lands) may be leased by the Secretary under the same conditions as contained in the leasing provisions of the mineral leasing laws, subject to the provisions hereof. The provisions of sections 271 to 276 of this title shall apply to deposits of sulfur covered by this chapter wherever situated. No mineral deposit covered by this section shall be leased except with the consent of the head of the executive department, independent establishment, or instrumentality having ju-

risdiction over the lands containing such deposit, or holding a mortgage or deed of trust secured by such lands which is unsatisfied of record, and subject to such conditions as that official may prescribe to insure the adequate utilization of the lands for the primary purposes for which they have been acquired or are being administered; *Provided,* That nothing in this chapter is intended, or shall be construed, to apply to or in any manner affect any mineral rights, exploration permits, leases or conveyances nor minerals that are or may be in any tidelands; or submerged lands; or in lands underlying the three mile zone or belt involved in the case of the United States of America against the State of California now pending on application for rehearing in the Supreme Court of the United States; or in lands underlying such three mile zone or belt, or the continental shelf, adjacent or littoral to any part of the land within the jurisdiction of the United States of America.

No. 77-1785

In the Supreme Court of the United States

OCTOBER TERM, 1978

KERR-McGEE CHEMICAL CORPORATION, PETITIONER

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The court of appeals did not write an opinion. Its reasons for reversal are stated in the judgment (Pet. App. 9a-10a). The memorandum orders of the district court (Pet. App. 1a-6a, 7a-8a) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1978. The petition for a writ of certiorari was filed on June 16, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly reversed the order of the district court that had required the Secretary of the Interior to issue mineral leases to petitioner before the Secretary determined whether petitioner met the requirements for entitlement to such leases and before the Secretary completed environmental studies that he deemed necessary to evaluate the merits of petitioner's lease applications.

STATEMENT

This case involves the application of certain regulations of the Secretary of the Interior, 43 C.F.R. Part 3520, 41 Fed. Reg. 18845-18848 ("1976 regulations"), to phosphate lease applications of petitioner that were pending before the Secretary when the regulations were promulgated. The regulations establish the procedures to be used by the Secretary in determining whether a lease applicant has satisfied the "valuable deposit" requirement of Section 9(b) of the Mineral Leasing Act of 1920, 41 Stat. 440, as amended by Section 1(a) of the Act of March 18, 1960, 74 Stat. 7, 30 U.S.C. 211(b).[1] The regulations also define the term "valuable deposits" in

[1]That Section provides:

> Where prospecting or exploratory work is necessary to determine the existence or workability of phosphate deposits in any unclaimed, undeveloped area, the Secretary of the Interior is authorized to issue, to any applicant qualified under this chapter, a prospecting permit which shall give the exclusive right to prospect for phosphate deposits, including associated minerals, for a period of two years, for not more than two thousand five hundred and sixty acres; and if prior to the expiration of the permit the permittee shows to the Secretary that valuable deposits of phosphate have been discovered within the area covered by his permit, the permittee shall be entitled to a lease for any or all of the land embraced in the prospecting permit.

Section 9(b). Their definition (43 C.F.R. 3520.1-1(c)) applies the "prudent man-marketability" test established by decisions of this Court;[2] under that test, a mining claim meets the valuable deposit requirement if a person of ordinary prudence would be justified in expending his time and money in developing the claim with a reasonable expectation that the mineral could be extracted and marketed at a profit. The Secretary's prior phosphate leasing regulations had repeated the statutory terms of Section 9(b) without providing further guidance (43 C.F.R. 3161.3-7 (1970)). The 1976 regulations were expressly made applicable to all pending and future applications (43 C.F.R. 3520.1-1(d)).

Petitioner's applications seek preference right leases to more than 6,500 acres of land in the Osceola National Forest, in north-central Florida. The applications were based on exploratory work conducted by petitioner under permits issued by the Secretary pursuant to Section 9(b) of the Act. The exploratory permits reserved the right to include "special stipulations to protect surface values" in any leases that might eventually be issued (J.A. 422).[3]

Petitioner filed its lease applications in 1969 and 1970. In March 1969 and December 1970, the United States Geological Survey (USGS) reported to the Eastern States Office of the Bureau of Land Management (BLM) that valuable deposits of phosphate had been discovered by petitioner during the permit period (J.A. 154). Those reports were based on evaluation of the quantity and quality of the mineral discovered. USGS did not evaluate the economic aspects of a mining operation on the lands

[2]*E.g.*, *United States* v. *Coleman*, 390 U.S. 599, 602-603; *Andrus* v. *Charlestone Stone Products Co.*, No. 77-380, decided May 31, 1978, slip op. 2 n. 4.

[3]"J.A." refers to the joint appendix filed in the court of appeals.

covered by the applications, as the prudent man-marketability test would require (J.A. 154-155).

No leases were issued. Instead, to fulfill his new responsibilities under the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.*, the Secretary of the Interior directed that the environmental consequences of the proposed mining activity be examined in an environmental impact statement (EIS). It was also announced that no leases would be issued until the conclusion of the environmental review (Pet. App. 2a).

A draft EIS was prepared, public hearings were held in Florida, and written comments were received. Many of the issues raised concerned the impact of the proposed mining activities on endangered or threatened wildlife species and on the aquifer system that supplies water for northern Florida. A final EIS was published in 1974. The final EIS identified several endangered or threatened species that may inhabit the Osceola National Forest and concluded that, if those species do inhabit the Forest (which it could not conclusively determine), phosphate mining would destroy them. EIS, pp. III-22, IV-10, V-4, VII-3.

The EIS also identified areas downstream from rivers running through the proposed mining region as important aquifer recharge areas. Several possible impacts on water quality and quantity were discussed. These included depletion of aquifers from the use of well water for mining, resulting transfers of water between aquifers and contamination of aquifer water, and possible pollution of surface and subsurface waters by leakage from tailing ponds, most notably with radioactive radium 226, which is present in the phosphate ore. EIS, pp. III-12 to III-14, V-2, VI-1 to VI-2. Noting the limited knowledge of the

hydrology of the proposed mining area, the EIS suggested the need for further study. EIS, pp. III-12, IV-4, VIII-1.

The EIS and related documents recommended delay in the processing of lease applications until more knowledge could be acquired (J.A. 155-1 to 155-42, particularly 155-27 to 155-29, 155-32, 155-36). As a result of these recommendations, the Secretary in 1975 directed the USGS and the Fish and Wildlife Service to conduct a study to determine whether phosphate mining would damage or pollute the aquifer that provides the municipal water supply for Lake City, Florida, and supplies other water users in northern Florida, and whether it would injure any endangered or threatened species or destroy or modify any portion of a critical habitat of such species (J.A. 36, 149-153). The Secretary determined that the results of this study were necessary to supplement the EIS and comply with NEPA and also to assure compliance with the Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C. 1531 *et seq.*, particularly Section 7 of that Act, 16 U.S.C. 1536 (see *Tennessee Valley Authority* v. *Hill*, No. 76-1701, decided June 15, 1978). J.A. 150, 418-420, 422.

In April 1976, petitioner filed this action to compel the Secretary of the Interior to issue the mineral leases it sought. The State of Florida intervened as a defendant, opposing issuance of the leases to petitioner.

Shortly after the suit was filed, the Secretary promulgated his 1976 regulations. Because the prior USGS reports concluding that petitioner had found "valuable deposits" had not employed the prudent man-marketability test prescribed in these regulations, the Secretary (J.A. 150) and the responsible USGS official (J.A. 155) concluded that USGS must reexamine petitioner's applications in accordance with the new regulations. That reexamination would incorporate the

results of the environmental study and the supplemented EIS (J.A. 150). Those results were needed for the reexamination so that the costs of complying with environmental requirements could be included in the economic costs of the proposed mining operation (see 43 C.F.R. 3521.1-1(c)), and so that the terms of the leases could reflect the environmental findings (J.A. 150).

Rather than comply with the 1976 regulations, petitioner moved for summary judgment in the district court to compel the Secretary to issue the leases. The district court granted petitioner's motion and ordered the Secretary to issue the leases immediately (Pet. App. 6a). The court concluded that the USGS reports in 1969 and 1970 gave petitioner "an acquired and vested interest" in the leases (Pet. App. 5a).

The court of appeals summarily reversed the district court's order. The court stated (Pet. App. 10a):

> The ongoing administrative proceedings before the Secretary of the Interior were aborted by the issuance of the writ of mandamus by the District Court. Appellee should have exhausted its administrative remedies before seeking the writ or petitioning for judicial review.

The court remanded with instructions to dismiss the complaint (*ibid.*).

ARGUMENT

The court of appeals reversed the district court's mandamus order because the applicable administrative processes, including those specified in the 1976 regulations, have not been completed and the Secretary has made no finding that petitioner has discovered a valuable deposit of phosphate within the permit areas. The court of appeals' judgment is correct and consistent with decisions of this Court.

1. The 1976 regulations are applicable to petitioner's pending lease applications. The Secretary of the Interior was not powerless to reject the findings of an official of the USGS (see J.A. 154), one of his subordinate officers, and call for new findings when he concluded that the original findings were based on an incorrect legal standard and did not take into account environmental concerns that Congress required him to consider.

As specified by Congress in Section 9(b) of the Mineral Leasing Act, note 1, *supra*, an applicant is not entitled to a phosphate lease unless he "* * * shows to the Secretary that valuable deposits of phosphate have been discovered within the area covered by his permit * * *." 30 U.S.C. 211(b). The words of the statute make two points clear: the discovery must be of a "valuable deposit," and it is the Secretary who is empowered to decide whether such a discovery has been made.

"Valuable deposit" is a term of art. The test established by this Court is the "prudent man" test, supplemented by the "marketability" standard; under those tests, a mining claimant must demonstrate to the Secretary that the discovered deposit is one that a person of ordinary prudence would be justified in expending his time and money to develop in the reasonable expectation that the mineral could be extracted and marketed at a profit. *United States* v. *Coleman*, 390 U.S. 599, 602-603.[4]

[4]See also *Andrus* v. *Charlestone Stone Products Co.*, *supra*, slip op. 2 n. 4; *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 335-336; *Cameron* v. *United States*, 252 U.S. 450, 459; *Chrisman* v. *Miller*, 197 U.S. 313, 322. All these decisions were based on this Court's approval of the Secretary's adoption of this test in *Castle* v. *Womble*, 19 L.D. 455, 457.

Congress in the Mineral Leasing Act used the word "valuable" deliberately, with awareness of its judicial interpretation.[5]

But the USGS, in its 1969 and 1970 reports on petitioner's lease applications, did not apply the prudent man-marketability test in determining whether petitioner had discovered a "valuable deposit" of phosphate. USGS examined only "the quantity and quality of the discovered deposits" (J.A. 154). It did not weigh economic considerations such as the costs of extraction, transportation, processing, and marketing, or of compliance with environmental, reclamation, and safety requirements; nor did it examine the market for the mineral. Because USGS failed to apply the correct legal standard,[6] both the Secretary and the USGS have

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[5]During the House debate, Congressman Howard suggested changing "valuable" deposit to "paying" deposit. The floor manager, Congressman Sinnot, replied (58 Cong. Rec. 7537 (1919)):

> That language was put in with a great deal of consideration, and we would not like a change from "valuable" to "paying." There is quite a distinction. We are in line with the decisions of the courts as to what is a discovery, and I think it would be a very dangerous matter to experiment with this language at this time.

[6]In arguing (Pet. 12-14) that USGS did apply the correct criterion in its 1969 and 1970 reports, petitioner relies on Departmental actions relating to classification of mineral lands for exploration purposes, rather than actions relating to preference right leasing for mining purposes. Different standards govern the two purposes. "Where prospecting or exploratory work is necessary to determine the existence or workability of phosphate deposits," a prospecting permit may be issued under 30 U.S.C. 211(b). But issuance of a lease for mining under that section is dependent on a showing of "valuable deposits of phosphate." Whether a mineral is present in workable quantities is a different question from whether an economically profitable mine can be operated. The authorities cited by petitioner—*James C. Goodwin*, 9 I.B.L.A. 139; *Emil Usibelli*, A-26277 (unpublished decision, October 2, 1951); Department of the Interior, *Geological Survey Conservation Division Manual*, section 671.5.2 B(1)(1969)—all involve the workability question and hence are inapposite to the valuable deposit issue. The difference between the

properly concluded that new determinations are required to comply with Section 9(b). 43 C.F.R. 3520.1-1(d); J.A. 150, 155.[7]

The Secretary's authority to order this new determination is clear. The Secretary, together with the Secretary of Agriculture, still has control over these lands, as no leases have yet been issued. The Secretary of the Interior has supervisory authority over USGS (43 U.S.C. 1457; *Knight* v. *United States Land Association*, 142 U.S. 161, 181), and "[w]hen the Secretary has the duty to issue a patent or to furnish other evidence of title of a claimant, he must have authority to determine the questions of law incident to the performance of that duty." *West* v. *Standard Oil Co.*, 278 U.S. 200, 220; *Litchfield* v. *Register*, 9 Wall. 575, 577-578. The Secretary "has a continuing jurisdiction with respect to these lands until a [lease] issues, and he is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors in interest." *Ideal Basic Industries, Inc.* v. *Morton*, 542 F. 2d 1364, 1367-1368 (C.A. 9); accord, *West* v. *Standard Oil Co.*, *supra*, 278 U.S. at 210; see also *Best* v. *Humboldt Placer Mining Co.*, 371 U.S. 334, 336-340. As stated in *Pacific Oil Co.* v. *Udall*,

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applicable standards is recognized in *Goodwin*, *supra*, 9 I.B.L.A. at 156-157 ("the test of workability under the Mineral Leasing Act differs from the prudent man rule * * *"); *Atlas Corp.*, 74 I.D. 76, 84 ("it is not necessary, in order to sustain a finding that such deposits do exist in workable quantity, that a determination can be made with some degree of assurance that a mining operation will be an economic success"); and the *Conservation Division Manual*, *supra*, section 671.5.2B(6) (J.Sa. 248).

[7]The district court's conclusion (Pet. App. 5a) that the government did not contend that the law had been incorrectly interpreted by USGS was thus incorrect.

406 F. 2d 452, 456 (C.A. 10), in affirming the Secretary's refusal to reopen a patent application proceeding even though the BLM had taken contrary action:

> There is no question but that he has the power not to reconsider, and this he exercised in an effective manner when the matter came before *him* for the first time. The Secretary is the one who has this discretion and not his subordinates. [Emphasis in original.]

Indeed, when a subordinate has taken action inconsistent with the applicable law, the Secretary may reject the subordinate's act and take his own action based on the correct standard even if a lease has already issued. *Boesche* v. *Udall*, 373 U.S. 472, 476-477. The Secretary's authority to rectify the error and apply the correct legal standard to pending matters prevails even though the prior erroneous interpretation was made or endorsed by a prior Secretary (see *West* v. *Standard Oil Co.*, *supra*, 278 U.S. at 210), and even though it may have been of long standing. See *National Labor Relations Board* v. *J. Weingarten, Inc.*, 420 U.S. 251, 265-266.[8]

The district court's statement that the USGS reports in 1969 and 1970 gave petitioner "an acquired and vested interest" in the leases (Pet. App. 5a) was correctly rejected by the court of appeals, which found instead that there were "ongoing administrative proceedings before the Secretary of the Interior" which the district court's writ of mandamus had aborted (Pet. App. 10a). The final decision on issuance of the leases rests with "the Secretary," as Section 9(b) of the Mineral Leasing Act states. That decision has not yet been made, having been

[8]See also *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114, 127 n. 15; *Automobile Club* v. *Commissioner of Internal Revenue*, 353 U.S. 180, 183-184.

postponed pending application of the 1976 regulations and the outcome of the new environmental studies.[9]

Petitioner has not been denied any substantive or procedural right. Petitioner remains entitled to submit lease applications and to have those applications ruled on by the Secretary in accordance with the applicable law. Retroactive application of a legal standard is not involved here. See *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 135. For this reason, *Greene* v. *United States*, 376 U.S. 149, and the other cases cited by petitioner (Pet. 15-17) are inapplicable. The decision in *Greene* turned on the fact that when the regulation there in question was changed, Greene's entitlement to compensation had been finally recognized by the agency and the reviewing courts. See *Thorpe* v. *Housing Authority*, 393 U.S. 268, 282 n. 43. Here, petitioner's claim to the leases had not been ruled on by the Secretary at the time when his new regulations and procedures went into effect.

2. Because the administrative processes have not been exhausted and the Secretary has not ruled on petitioner's applications, the court of appeals correctly held that judicial relief was unavailable. "To interfere now, is to take from the officers of the land department the functions which the law confides to them and exercise them by the court." *Litchfield* v. *Register*, *supra*, 9 Wall. at 578; see also *Best* v. *Humboldt Placer Mining Co.*, *supra*, 371 U.S. at 336-340. See generally *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-52.

[9]On February 16, 1977, the Secretary informed BLM that he personally would make all final leasing decisions concerning phosphate leases.

Furthermore, the district court's writ of mandamus, ordering the Secretary "to issue said leases immediately" (Pet. App. 6a), was an improper remedy. Mandamus is available only when all the duties remaining to be performed are non-discretionary. *United States ex rel. McLennan* v. *Wilbur*, 283 U.S. 414, 420. Here, the Secretary of the Interior and the Secretary of Agriculture have discretionary decisions to make before any leases can issue—decisions not only on whether to issue the leases, but on the terms and conditions that should be imposed on any leases that are issued. See 30 U.S.C. 187, 352. Both Secretaries also have discretionary responsibilities to discharge with respect to the lease applications in order to comply with their duties under NEPA and the Endangered Species Act.

Even an applicant who has satisfied the "valuable deposit" requirement has no vested right to any particular form of lease. *Montana Eastern Pipe Line Company*, 55 I.D. 189, 191-192.[10] It is improper to grant mandamus or injunctive relief to force the execution of a lease where the material terms of the lease are still indefinite. *D. H. Overmyer Co.* v. *Brown*, 439 F. 2d 926, 929 (C.A. 10); *Hearst Radio, Inc.* v. *Good*, 91 F. 2d 555, 556 (C.A.D.C.).

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[10]Although there is a standard phosphate lease form, additional terms and conditions are almost invariably added. Petitioner conceded below that it is not entitled to any specific form of lease (Brief in Court of Appeals, note at page 36).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1978.

DOJ-1978-08

No. 77-1785

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

KERR-McGEE CHEMICAL CORPORATION,
Petitioner,

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, et al.,
Respondents.

BRIEF OF RESPONDENT STATE OF FLORIDA IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

Respondent State of Florida disagrees with Petitioner's statement of the questions presented because it presupposes that once "valuable deposits" are certified that the Secretary of the Interior must issue a lease; therefore, the following questions are presented:

1. Does the Secretary of the Interior retain discretion under the Mineral Leasing Act to deny the issuance of a preference right phosphate lease in spite of a finding of "valuable deposits," when the issuance of such lease would not be in the public interest?

2. Must the Secretary of Agriculture give his approval prior to the issuance of preference right phosphate leases?

3. Does the Endangered Species Act of 1973 prohibit phosphate strip mining in the Osceola National Forest?

4. Does the National Environmental Policy Act give the Secretary of the Interior discretionary authority to refuse to grant preference right phosphate leases?

STATUTE INVOLVED

Section 9 of the Mineral Leasing Act of 1920, 41 Stat. 437 as it appears in 30 U.S.C. §211, provides in pertinent part (Petitioner quoted only (b), apparently suggesting that (a) was not pertinent):

> (a) The Secretary of the Interior is authorized to lease to any applicant qualified under this chapter, through advertisement, competitive bidding, or such other methods as he may by general regulations adopt, any phosphate deposits of the United States, and lands containing such deposits, including associated and related minerals, when in his judgment the public interest will be best served thereby.

> The lands shall be leased under such terms and conditions as are herein specified, in units reasonably compact in form of not to exceed two thousand five hundred and sixty acres.
>
> (b) Where prospecting or exploratory work is necessary to determine the existence or workability of phosphate deposits in any unclaimed, undeveloped area, the Secretary of the Interior is authorized to issue, to any applicant qualified under this chapter, a prospecting permit which shall give the exclusive right to prospect for phosphate deposits, including associated minerals, for a period of two years, for not more than two thousand five hundred and sixty acres; and if prior to the expiration of the permit the permittee shows to the Secretary that valuable deposits of phosphate have been discovered within the area covered by his permit, the permittee shall be entitled to a lease for any or all of the land embraced in the prospecting permit.

STATEMENT OF THE CASE

Kerr-McGee Chemical Corporation filed suit on April 13, 1976, seeking to enjoin the Secretary of the Interior from refusing to grant preference leases, and to declare that 30 U.S.C. §211(a) & (b) required that the Secretary issue the leases when the United States Geological Survey certifies the discovery of "valuable deposits" of phosphate.

The State of Florida, which had earlier filed suit against the Secretary of the Interior to enjoin him from issuing the leases, was allowed to intervene. This earlier suit by the State of Florida resulted in the preparation of an environmental impact statement pursuant to the provisions of NEPA. The State of Florida urged in the District Court and Circuit Court of Appeals an interpretation of 30 U.S.C. §211(a) & (b) that would require the Secretary to issue leases only when he finds that it is in the "public interest."

The District Court declared that 30 U.S.C. §211 required the issuance of preference right mining lease when a permittee made a discovery of a valuable mineral deposit on land embraced in a valid permit, and that since Kerr-McGee had made such a discovery, preference right leases must issue.

On appeal, the Secretary asserted that Kerr-McGee had not complied with the new federal regulations for the certification of valuable deposits. The appeal of the State of Florida, which was consolidated with the Secretary's appeal, asserted several positions: (1) that 30 U.S.C. §211 requires the Secretary to issue a preference right lease only when it is in the public interest, (2) that the Endangered Species Act of 1973 prohibits phosphate mining in the Osceola National Forest, (3) that the Secretary of Agriculture must approve the leases before their issuance, and (4) that the Secretary could withdraw the lands from availability for mining.

The Circuit Court of Appeals for the District of Columbia summarily reversed the District Court and ordered the case dismissed for failure of Kerr-McGee to exhaust administrative remedies.

ARGUMENT

Petitioner Kerr-McGee has offered this Court no cogent legal arguments for this Court to review the decision of the Circuit Court of Appeals for the District of Columbia in this case. The Secretary of the Interior has not made a final decision whether to issue the preference leases. If the Secretary decides to issue the

leases, then the action of this Court, and of the attorneys in presenting their respective positions, would be in vain. If the Secretary does not issue the leases, the reasons for his decision will be necessary for judicial review. In either case, judicial intervention at this particular point, as the Circuit Court of Appeals has ruled, is premature.

Although the narrow ruling is sufficient to deny review in this case, Respondent would show the presence of other meritorious arguments which would result in a remand and dismissal of the District Court's decision.

In determining whether a prospecting permittee has the right to a lease if "valuable deposits" are discovered, paragraphs (a) and (b) of 30 U.S.C. §211 must be considered together, and interpreted so as to create harmony. Weinberger v. Hynson, Westiott & Dunning, 412 U.S. 609 (1973). Section 211(a) is a general grant of authority to the Secretary to issue leases to mine federal phosphate deposits "when in his judgment the public interest will be best served thereby." It provides

that the leasing be accomplished by specific means and "such other methods" as may be adopted. Section 211(b) describes such another method--the issuance of prospecting permits and preference right leases. This latter section only grants the prospecting permittee who has discovered "valuable deposits" a preference or priority in the issuance of a lease if the Secretary determines that the public interest will best be served.

The congressional history of Section 211(b) supports this interpretation. Senate Bill S.2061, which added (b) states its purpose as follows:

> If enacted, S.2061, as amended, would correct the situation [of a permittee who discovers phosphate having no advantage in bidding for a lease] since a permittee would have a preference right to a lease. . . . (e.s.) Senate Report No. 879 (1960 U.S. Code Cong. & Adm. News, 1805).

Since the purpose was to correct the situation of an applicant for a lease who performed prospecting work to have to outbid his rivals, it is clear that (b) creates a right to a lease as against rival applicants, but not an absolute right to a

lease. If Congress had intended that the right be absolute it would not have spoken of it as a preference right.

The fact that the interpretation placed on the statute by the Secretary of the Interior is contrary to that asserted by the State of Florida is not controlling, since no agency expertise was necessary in such interpretation and construction of statutes is ultimately a judicial responsibility.

In addition, 30 U.S.C §211 should be construed in accordance with the policies set forth in the National Environmental Policy Act [NEPA]. There can be little doubt that issuance of leases to strip mine a substantial portion of a national forest is "major federal action." See Texas Committee on Natural Resources v. Bergland, ___ F.2d ___, 11 ERC 1673, 5th Cir.1978. The statutory conflict provision of NEPA has been applied sparingly. The conflict between the agency's organic statute and NEPA must be both fundamental and irreconcilable. Flint Ridge Development Co. v. Scenic Rivers Association, 426 U.S. 776, reh. denied, 429 U.S. 785 (1975). Such a fundamental and irreconcilable conflict does not exist in the instant case, and the Secretary should be required to consider the adverse environmental effects

of his action before deciding whether or not to issue the leases.

The Secretary of the Interior posseses broad inherent discretion in protecting the environment. In Gulf Oil v. Morton, 493 F.2d 141 (9th Cir.1973), the court upheld the Secretary's decision to suspend offshore drilling operations based upon his determination that continued drilling would pose an unacceptable risk to the marine environment. The court held that NEPA removed all doubts regarding the Secretary's broad powers in protecting the environment. Any doubt as to the interpretation of §211 was removed when Congress enacted NEPA.

The Mineral Leasing Act also provides that mineral deposits shall not be leased except with the consent of the head of the department having jurisdiction over the lands containing the deposit. 30 U.S.C. §352. There has been no evidence ever presented indicating that the Secretary of Agriculture has ever reviewed Kerr-McGee's lease applications.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 77-1785

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

KERR-McGEE CHEMICAL CORPORATION, *Petitioner*,

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, *et al.*, *Respondents*.

REPLY BRIEF FOR PETITIONER

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September 15, 1978

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et al., Respondents.

REPLY BRIEF FOR PETITIONER

Both the United States and the State of Florida, as the basis for their opposition to Kerr-McGee Chemical Corporation's petition for certiorari, argue that the Department of the Interior is authorized by various environmental statutes to ignore Kerr-McGee's vested rights to phosphate leases established under the Mineral Leasing Act. The novelty and breadth of the arguments made by respondents aptly demonstrate the importance of the substantial federal question posed by this case. The question whether Kerr-McGee's rights to phosphate leases survive the Department's subsequent adoption of new administrative regulations merits review by this Court.

I.

THE IMPORTANCE OF THIS CASE HAS NOT BEEN DENIED

Neither the United States nor the State of Florida have sought to deny the very substantial importance of the issues presented for review. Indeed, although the form of their arguments varies, both recognize that the case presents centrally important questions as to the manner in which the Department of the Interior fulfills its responsibilities under federal environmental statutes and under the federal mining laws.

In this case, Kerr-McGee explored federal lands located in the Osceola National Forest in Florida for four years (from 1965 to 1969) in the expectation that, if it discovered "valuable" deposits of phosphate, it would thereupon be issued the phosphate leases to which Section 9 of the Mineral Leasing Act of 1920, 41 Stat. 437, as amended by Section 1(a) of the Act of March 18, 1960, 74 Stat. 7, 30 U.S.C. § 211(b) provides the Company "shall be entitled." There is no dispute that after Kerr-McGee's applications for leases were made in 1969 and 1970, the United States Geological Survey, acting as the designee of the Secretary,[1] applied standards used by the USGS since

[1] Although the United States suggests the USGS was merely "subordinate" to the Secretary of the Interior at the time it certified Kerr-McGee's rights to leases (U.S. Opp. p. 7), elsewhere in its brief to this Court the Government implicitly concedes that until February 16, 1977, the USGS had been delegated full responsibility by the Secretary for making decisions whether mineral leases should be issued to prospecting permittees under the Mineral Leasing Act. (*See* U.S. Opp. p. 11 n.9) *No* agency or person within the Department other than the USGS has ever been responsible for determining whether mineral leases should issue to prospecting permittees under the Mineral Leasing Act.

1920 in making lease determinations and determined that Kerr-McGee was statutorily entitled to five phosphate leases.[2] These certifications of Kerr-McGee's rights were made to the Secretary on March 28, 1969 and December 11, 1970. There is no claim that the USGS misapplied the prevailing administrative criteria in making its 1969 and 1970 certifications, or that Kerr-McGee has failed, in any way, to satisfy all regulations and procedures in effect at the time the USGS certified its mineral discovery.

II.

THE COURT OF APPEALS' DECISION IS MANIFESTLY INCONSISTENT WITH THIS COURT'S DECISION IN *GREENE* v. *UNITED STATES*

1. The United States argues that the certifications of Kerr-McGee's rights made by the USGS in 1969 and 1970 were based on an "incorrect legal standard" (U.S. Opp. 7), and that the USGS certifications, accordingly, can be distinguished from the administrative findings in *Greene* v. *United States,* 376 U.S. 149

[2] The United States misleadingly suggests (U.S. Opp. p. 8 n.6) that the criteria applied by the USGS in 1969 and 1970 in establishing Kerr-McGee's rights related solely "to the classification of mineral lands for exploration purposes," and thus, inferentially, were inappropriate for use in determining whether a discovery was sufficiently "valuable" so as to entitle the prospector to a lease. In fact, the standards employed by USGS have been in uninterrupted use by the Department in making decisions whether mineral leases should issue under the Mineral Leasing Act since the Act's passage in 1920. (*See* J.A. 308, 385, 326, 331.) The Department's *Geological Survey Conservation Division Manual* provides expressly that the criteria in question are to be applied by the USGS in making "[d]iscovery [d]eterminations" in passing on the rights of applicants for mineral leases. (*See* § 671.6.1 of the *Manual,* J.A. 250.)

(1964). The Government's contention is that this Court's decisions in *Chrisman* v. *Miller,* 197 U.S. 313, 322 (1905); *Cameron* v. *United States,* 252 U.S. 450, 459 (1920); *Best* v. *Humbolt Placer Mining Co.,* 371 U.S. 334 (1963); *United States* v. *Coleman,* 390 U.S. 599 (1968), and most recently in *Andrus* v. *Charlestone Stone Co.,* ___ U.S. ___, 56 L.Ed.2d 570 (1978), *require* the use of a "marketability" standard in assessing the value of mineral deposits, notwithstanding the fact these decisions have never been applied by the Department to leases under the Mineral Leasing Act. In fact, these decisions upheld the Department's use of a "marketability test" in determining the value of mineral deposits under the General Mining Law of 1972, 30 U.S.C. § 22 *et seq.,* in a context limited to common minerals of little intrinsic value.[3] The Court in *Coleman* held that use of a marketability test *in addition to* the prudent man test was proper in assessing the value of quartzite, "one of the most common of all solid materials," (390 U.S. at 600), to determine whether claims for land under the General Mining Law of 1872 should be honored. There is no suggestion in *Coleman* that a marketability test should be used to determine the value of discoveries of intrinsically valuable minerals. As the Court noted, "there is little room for doubt that [precious metals] can be extracted and marketed at a profit." 390 U.S. at 603. *See Foster* v. *Seaton,* 271 F.2d

[3] In *Coleman,* the Court accepted the lower court's finding that use of a marketability test " 'involves the imposition of a different and more onerous standard on claims for minerals of widespread occurrence than for rarer minerals which have generally been dealt with under the prudent-man test . . .' " 390 U.S. at 603.

836, 838 (D.C. Cir. 1959); *Denison* v. *Udall,* 248 F. Supp. 942, 945 (D. Ariz. 1965).[4]

The Government's current interpretation of the Mineral Leasing Act, moreover, is contrary to the interpretation placed on the Act by the Department since the Act's passage in 1920. Indeed, the Government cites no departmental decisions, or decisions by any court, applying such a standard to leases under the Mineral Leasing Act. The Department has consistently upheld the use of the "quantity and quality test" used by the USGS in certifying Kerr-McGee's discoveries, both in formal decisions by the Board of Land Appeals, and in two legal opinions rendered by the Department's Solicitors.[5] (*See* Pet. 13-14.) Under the established

[4] As one authoritative treatise explained this test,

> "[P]resent marketability at a profit developed into an *additional* requirement, over and above the requirements of the prudent man rule, where nonmetalliferous minerals of widespread occurrence were involved." I. *American Law of Mining,* § 4.82, at 710.1-710.2 (1977). (emphasis supplied)

The *American Law of Mining* cites as the most authoritative explanation of the marketability test the Opinion of the Solicitor, "Review of the 'Marketability Rule' as applied to the Law of Discovery," 69 I.D. 145 (1962), in which the Department's Solicitor makes it plain that the marketability test has been applied only in cases under the General Mining Laws to minerals of no intrinsic value. *See,* I. *American Law of Mining,* §4.81 at 708-09. The Government has conceded that the mineral at issue in this case, phosphate, is an intrinsically valuable mineral with a ready market, noting that "phosphate is a scarce resource on a worldwide basis." (U.S. Court of Appeals' Brief, 48).

[5] As found by the district court:

> "[I]n the 1969 and 1970 certifications the USGS relied upon longstanding criteria; that the certifications reflected a consistent application of administrative practices; and that the Secretary, several solicitors and other responsible officials of the Department of the Interior have likewise voiced their support and recognition of the standard and practices." (Pet. App. 8a.)

caselaw of this Court, such a longstanding construction of a statute by the agency charged with the statute's enforcement has a virtually irrebuttable presumption of validity. *Udall* v. *Tallman,* 380 U.S. 1 (1965); *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 472 (1915); *United States* v. *Alabama Railroad Co.,* 142 U.S. 615, 621 (1892).

This case, of course, does not present the question whether the Department may, in the future, choose to apply the marketability test in issuing leases under the Mineral Leasing Act, as required for the first time in the Department's May 1976 regulations. Rather, the issue here is limited to the question whether the USGS's failure to apply such a test to Kerr-McGee's discoveries in 1969 and 1970 is such "plain error" as to warrant the Department's refusal to honor the rights established by the USGS. The Department's present assertion—made only in this litigation—that its prior fifty-year interpretation of the Mineral Leasing Act was "legally erroneous," is contrary to the clear weight of authority.[6]

2. The United States argues that, unlike *Greene,* there were ongoing administrative proceedings concerning Kerr-McGee's lease applications at the time that the Department's May 1976 regulations were promulgated. There is no basis for such a claim. The procedures established by the Department under the Mineral Leasing Act for evaluating the rights of pro-

[6] The Government's present position that the criteria used by the USGS were legally erroneous not only is contrary to the past practices of the Department, but is also contrary to the considered judgment of the Department's senior legal officer who in a legal memorandum dated June 30, 1975, concluded that the criteria used by the USGS in certifying the value of Kerr-McGee's discoveries rested on a "defensible legal basis," and that any challenge to these criteria had "defects." (J.A. 100)

specting permittees to mineral leases had been completed some *six* years before this litigation commenced.

Indeed, even the NEPA process had been completed well before this suit commenced. After three years of preparation, the Department issued on June 27, 1974 a *final* environmental impact statement regarding the environmental implications of phosphate mining in the Osceola National Forest. This exhaustive statement has never been challenged. Despite its present suggestion to this Court that the final Osceola impact statement is deficient, the Government finalized the statement in 1974 and gave no indication until it filed its brief with the Court of Appeals in July 1977—three years later—that the impact statement might require supplementation.

3. The State of Florida argues that NEPA should be construed as authorizing the Department to ignore the rights of mining companies if, in the opinion of the Department, honoring such rights might have adverse environmental consequences.[7] This argument is supported by no precedent of this or any other court, and in fact is contrary to well-established principle

[7] The State also argues that Section 9(b) of the Mineral Leasing Act permits the Department, in its discretion, to refuse to issue a lease notwithstanding the value of the permittee's discovery. Such an argument, rejected by the district court (Pet. App. 4a-5a) and apparently not considered by the court below, is supported neither by precedent nor the plain language of the Act which states that a prospecting permittee making a "valuable" discovery of phosphate "shall be entitled to a lease." The Department has consistently construed the Act as creating an automatic, mandatory entitlement to a lease if a "valuable" discovery is made, and both before and during this litigation has rejected the theory urged by the State.

recently restated by this Court in *Flint Ridge Develop. Co.* v. *Scenic Rivers Assn.*, 426 U.S. 776, 788 (1976).

> "Section 102 [NEPA] recognizes, however, that where a clear and unavoidable conflict in statutory authority exists, NEPA must give way. As we noted in *United States* v. *SCRAP*, 412 U.S. 669, 694 (1973), 'NEPA was not intended to repeal by implication any other statute.'"

There is, moreover, no real conflict between the process of environmental review and analysis required under NEPA, and the rights of mining companies under the Mineral Leasing Act. It is undisputed that the issuance of mineral leases poses *no* threat to the environment. The Department's regulations provide that the development of a mining plan and approval of the plan by the Department are unconditional prerequisites to the commencement of any mining operations. Under these regulations, the Department is entitled to impose any environmental stipulations that are reasonably necessary to protect the environment as a condition of its approval of mining plans. *See* 30 C.F.R. § 231.10. As the district court found,

> "The issuance of a lease will permit plaintiff to commence preparation of a mining plan but their proposals must be approved by the Secretary of the Interior before mining operations actually begin." (Pet. App. 5a-6a)

4. Finally, the United States argues that irrespective of Kerr-McGee's rights to leases, the Court of Appeals correctly reversed the mandamus order of the district court because the Secretary may exercise discretion in establishing the terms of a mineral lease, and mandamus is an inappropriate remedy in the circumstances. But there is no claim that the Department is unable immediately to issue the types of phosphate

leases that have normally been granted prospecting permittees. Rather, the argument is only that unusual environmental stipulations may be appropriate in this case, and that the development of such environmental stipulations may require the exercise of Secretarial discretion.[8] The Government has confused, however, the critically important distinction between the issuance of leases and the development of environmental stipulations that are imposed as conditions to approval of mining plans. The issuance of leases in no sense limits the ability of the Department to develop appropriate environmental stipulations, including the development of additional environmental analyses or a new impact statement, prior to approval of any mining plans. It is at this stage that the Secretary of the Interior (in consultation with the Department of Agriculture) will be in a position to exercise appropriate discretion, as has been the invariable practice in the past.

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[8] The United States misleadingly suggests that the district court's order required the Department to issue Kerr-McGee's leases "immediately" (U.S. Opp. 12), and was thus unreasonable, citing the district court's initial mandamus order (Pet. App. 6a). The Government fails to note that, at its own request, the district court modified the terms of this order to provide only that the Department "is directed to take the necessary steps" to issue the leases to which Kerr-McGee is entitled, thus permitting the development of appropriate lease terms and conditions while at the same time preserving Kerr-McGee's statutory rights. (*See* Pet. App. 8a.)

III.

THE WRIT OF CERTIORARI SHOULD BE ISSUED

For the foregoing reasons, as well as for the reasons stated in Kerr-McGee's Petition, a writ of certiorari should be issued.

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